No. 10616

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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CLAIBOURNE RANDOLPH TATUM,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLANT'S OPENING BRIEF.

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### Jurisdictional Statement.

This is an appeal from a judgment of conviction of the appellant by the District Court for the Northern District of California, Southern Division, and a jury thereof.

This court has jurisdiction under the provisions of 28 United States Code, Section 225, Subdivision (a), First and Third Subdivision (d).

### Statement of Case.

Appellant, one of Mankind United's associates, was convicted in the court below under an indictment for a violation of the Selective Training and Service Act of 1940 [R. p. 2] which charged that he did

> "knowingly and feloniously fail and neglect to comply with the order of his said local board No. 89, to report for induction into the land or naval Forces of

the United States, as provided in the said Selective Training and Service Act of 1940 and the rules and regulations made pursuant thereto."

In the court below and before the Selective Service Agencies he claimed to be a minister and that he was entitled to a classification as such under the Selective Training and Service Act.

During the trial it appeared that appellant's case had not been handled by the local draft board as provided by the Selective Service regulations. [R. p. 22.]

In addition, the court failed to give instructions requested by appellant on the failure of the local draft board to follow the Selective Service regulations. [R. pp. 57-8.]

In addition, the Hearing Officer violated the Selective Service regulations. [R. p. 36.]

Finally, the United States Attorney was guilty of prejudicial misconduct [R. p. 50] in his argument to the jury.

## Questions Involved.

### I.

Is this case to be distinguished from *Falbo v. United States?*

### II.

Was the appellant denied "due process of law" by reason of the alleged failures of the local draft board and of the Hearing Officer to follow Selective Service regulations?

### III.

Was there prejudicial misconduct by the United States Attorney?

## Specifications of Assigned Errors to Be Relied Upon.

The transcript of record, page 74, contains six assignments of errors specified by attorneys for appellant.

The appellant now relies upon specification No. 3 and specification No. 6.

Other assignments are abandoned by reason of the decision of the Supreme Court in the case of *Falbo v. United States,* 320 U. S. 549.

## ARGUMENT.

### POINT I.

### The Instant Case Is Not Determined by the Falbo Case.

*Falbo v. United States* decided some but not all of the points originally raised in this appeal.

Appellant no longer contends that he is entitled to a judicial review of the *propriety* or of the alleged arbitrariness of the draft board's classification. Neither does he contest the *power* and authority of the board to make any decision within the Selective Training and Service Act of 1940 and the regulations adopted thereunder.

Deprival of "due process" is the issue that removes this case from the guillotine of the *Falbo* decision. The Supreme Court pointedly called its *Falbo* pronouncement a decision on the "narrow question" of the availability of judicial review of the propriety of a board's classification.

The instant case involves *procedural failure* and will be discussed more fully under Point II of this argument.

It is submitted that the courts may set aside an administrative determination where a procedural failure is

apparent even in the absence of a congressional provision for a judicial review:

*Ng Fung Ho v. White,* 259 U. S. 276;

*Gegiow v. Uhl,* 239 U. S. 3;

*School of Magnetic Healing v. McAnulty,* 187 U. S. 94;

*Crf R. F. C. v. Bankers Trust Company,* 318 U. S. 163.

Also see:

*Monongahela Bridge Co. v. United States,* 216 U. S. 177, 195:

"Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of executive officers proceeding under the Act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they cannot find some remedy consistent with the law, for acts, whether done by governments or by individual persons, that violated principles devised for the protection of essential rights of property."

This is also the situation in *Cobbledick v. United States,* 309 U. S. 323, where it said:

"At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. To be sure, this too may involve an interruption of the trial or of the investigation. But not

> to allow this interruption would forever preclude review of the witness' claim for his alternatives are to abandon the claim or languish in jail."

Also in *Ohio Bell Tel. Co. v. Public Util. Comm'n of Ohio,* 301 U. S. 292, 304-305:

> "The right to such a hearing is one of the rudiments of fair play . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise on the footing of convenience or expediency, or cause of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

In our own circuit *after the Falbo decision* a district court has distinguished the case before it from the decision of the Supreme Court in the *Falbo* case. In *United States v. Peterson* [Appendix A] the United States District Court for the Northern District of California, January 28, 1944, the defendant moved to dismiss the indictment because of insufficient evidence to support the charge of failure to report for induction. Defendant had requested a personal hearing of his draft board but the board discussed his case privately and relayed its decision, by the clerk, to the defendant, who was waiting in the outer office. The court held the defendant had not been accorded due process of law and granted the motion to dismiss. The court emphasized that here the question was not whether registrant was properly classified but involves the effect of an omission of a "step in the selective process."

Before the *Peterson* decision United States District Court Judge A. F. St. Sure reached the same conclusion on a similar set of facts. [Appendix B.]

## POINT II.

**The Failures of the Local Board and of the Hearing Officer to Follow Selective Service Regulations Deprived Appellant of Due Process of Law and the Refusal of the Trial Court to Instruct the Jury on These Irregularities as Requested Was Prejudicial Error.**

A.

The local draft board did not consider, or even read, the affidavits the appellant submitted for the November 20, 1943, hearing. At this time appellant attempted to show the board that it had misclassified him and in the transcript of record, page 22, appears the following testimony elicited on cross-examination of John J. Foley, member of Selective Service Local Board No. 89 of San Francisco, and chairman thereof.

> "These affidavits, Defendant's Exhibits B and C, were not read by the members of Local Board No. 89, and were not used by us in classifying defendant, but were part of the appeal record."

Local draft boards are required to "consider" such submitted documents.

Section 625.2 (c) of the Selective Service regulations provides as follows:

> "(c) After the registrant has appeared before the member or members of the Local Board designated for the purpose, the Local Board *shall consider the new information which it received* and shall again classify the registrant in the same manner as if he had never before been classified, provided that if he has been physically examined by the examining physician, the Report of Physical Examination and Induc-

> tion (Form 221), already in his file, shall be used in case his physical or mental condition must be determined in order to complete his classification." (Italics ours.)

That the above regulation is mandatory is the clear inference in the decision of *In the Matter of Stanziale v. U. S.* (C. C. A. 3d), 138 F. (2d) 312, 316:

> "If the Board considered the case in the light of the facts presented to it the registrant cannot have court review by claiming that a wrong conclusion was reached even if we, were we triers of fact, might agree with him."

That local draft board No. 89 did not consider appellant's case "in the light of the facts presented to it" is clear. This refusal and failure of the board to read the evidence submitted to it by appellant substantially deprived appellant of his right to a personal appearance. Appellant was entitled to a personal appearance, under the regulations, and to one that was not a sham or mere pretense. The failure to accord appellant his rights was a denial of due process of law. Appellant's requested instructions No. 7 and No. 8 covered these points, were denied by the court, and exceptions thereto were timely taken. [R. 53.]

Denial of a hearing of the kind and character provided by the Selective Service regulations is the same as the denial of any hearing. See *U. S. ex rel. Vajteauer v. Commissioner of Immigration,* 273 U. S. 103.

Denial of the requested instructions on the "hearing" rights of registrants deprived appellant of due process of law within the meaning of the Fifth Amendment. See *Yamatoya v. Fisher,* 189 U. S. 86, and *St. Joseph Stockyards v. United States,* 298 U. S. 32.

In *Morgan v. United States,* 304 U. S. 1, 14, Chief Justice Hughes stated:

> ". . . Vast expansion of administrative agencies makes necessary that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play."

B.

The testimony of appellant shows moreover [R. p. 36], that the Hearing Officer never indicated to appellant that any evidence was in the Hearing Officer's possession that contradicted appellant's statements. The Hearing Officer's conclusion [R. pp. 161-2] shows that he had unfavorable evidence in his possession; but he gave appellant no opportunity to explain or rebut. Section 627.25 of the Selective Service regulations provides that the registrant shall be notified of the hearing before the Hearing Officer and the notification [Appendix C] contains information concerning the instructions given the Hearing Officer by the Department of Justice, Office of the Assistant Attorney General.[1] Instruction 4 reads:

> "At the hearing, the registrant at his request, will be informed by the Hearing Officer as to the general nature and character of any evidence disclosed by the investigation which is unfavorable to, or tends to defeat, his claim for exemption as a conscientious objector, and the registrant will be afforded an opportunity to explain or rebut such evidence."

---

[1]This court may take judicial notice of these instructions. *Bowles v. United States,* 319 U. S. 33, 87 L. ed. 1194, 1196.

It is only fair that a registrant should have an opportunity to meet evidence that is to be used against him. The necessities of the situation probably demand that the individual be deprived of an opportunity to meet face to face his accusers or even the agents who gather the accusations. Yet, it is certainly too summary an abandonment of the fundamental rights our American constitutional system accords an accused, for one acting as a judge to keep the registrant in ignorance of the accusations. Chief Justice Hughes in the *Morgan* case *(supra)* observed:

> "If these multiplying (administrative) agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

In accord are the *St. Joseph Stockyards* and *Yamatoya* cases *(supra)*.

## POINT III.

### The Argument of the United States Attorney to the Jury Was Prejudicial Misconduct.

On pages 50 and 51 of the transcript of record we find the following highly improper statements made in argument to the jury:

"Mr. Karesh: . . . I call your attention to the blood of the battlefield—

Mr. Wirin: We object to the blood of the battlefield and charge it as a prejudicial statement of counsel. We ask that the Court instruct counsel not to refer to the blood of the battlefield in his argument.

Mr. Karesh: I see nothing prejudicial about it, and I say to Your Honor—with all respect this is—it is the Selective Service System, and under the Selective Service Act if a man is called and refuses to respond, someone else must be called.

The Court: Proceed.

Mr. Wirin: May we have an exception?

The Court: Note an exception.

. . . . . .

Mr. Karesh: And by inference he casts on those who are now fighting in the armed forces of our country the stigma of traitor to God, on those men who were willing—

Mr. Wirin: I want to address this Court. I object to that remark of counsel on the ground it is highly prejudicial to the defendant, and we ask the Court to instruct counsel not to make that argument, on the ground it is improper, an unwarranted inference from any of the evidence in this case, and a consciously improper effort by the prosecutor to appeal to the prejudice of the jury.

Mr. Karesh: I can say, Your Honor, if anyone attempted to appeal to the patience [sic] and prejudice of anyone, it was you, yourself, counsel.

Mr. Wirin: Your Honor, we assign that as additional misconduct on the part of the prosecutor and request the Court to instruct the jury to disregard the statement of Mr. Karesh.

Mr. Karesh: Rather than to quibble, Your Honor, on such an issue, I will withdraw my argument on that point.

Mr. Wirin: No, we state to the Court the statement made by counsel—

The Court: What statement?

Mr. Wirin: The statement made about me is highly improper and an appeal to the prejudice of the jury.

The Court: Let the statements of both counsel go out and the jury will disregard them for all purposes in this case.

Mr. Wirin: May we have an exception, Your Honor?

The Court: Proceed.

Mr. Karesh: I might say the testimony of the defendant, 'traitor to God,' stands for itself."

These inflammatory statements were obviously intended to cause the jury's verdict to be the result of emotion rather than reason. Waving a bloody shirt may be accepted political tactics but should meet prompt rebuke when attempted in court. So said the Supreme Court in *Viereck v. The United States,* 318 U. S. 236, 63 S. Ct. 561, 87 L. Ed. 734:

"We think that the trial judge should have stopped counsel's discourse without waiting for an objection."

Although the *Viereck* case is comparatively recent it has been quoted and cited so frequently that it perhaps can be considered a landmark. Immediately preceding the above quotation the court said:

> "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted."

The objectionable remarks of government counsel in the *Viereck* case were quoted by the court as follows:

> " 'In closing, let me remind you, ladies and gentlemen, that this is war. This is war, harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps.
>
> " 'This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of a crime, just as much as they are relying upon the protection of the men who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here.
>
> " 'As a representative of your government I am calling upon every one of you to do your duty.' "

As an answer to this last statement the court quoted *Berger v. United States,* 295 U. S. 78, 88:

> " 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all times; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor —indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' "

These views are reflected in the California state courts. *People v. McDaniel,* 140 P. (2d) 88, 92, and *People v. Lynch,* 140 P. (2d) 418, 424, by Judge White:

> "What was said by the Chief Justice of the United States Supreme Court in the case of *Viereck v. United States,* 318 U. S. 236, 63 S. Ct. 561, 566, 87 L. Ed. ....., reflects our views as to the duties and obligations of a prosecuting officer."

Again, in *Bagley v. The United States,* 136 F. (2d) 567, 570:

> " 'At a time when passion and prejudice are heightened by emotions, stirred by our participation in a great war,' Viereck v. United States, 63 S. Ct. 561, 566, 87 L. Ed. ....., we must be particularly careful to hold to the foundations of our freedom."

Misconduct by government counsel in argument to the jury has been the reason assigned for numerous reversals. In the case of *Beck v. The United States,* 33 F. (2d) 107, 114, the court said:

> "A trial in the United States court is a serious effort to ascertain the truth; atmosphere should not displace evidence; passion and prejudice are not aids in ascertainment of the truth, and studied efforts to arouse them cannot be countenanced; the ascertainment of the truth, to the end that the law may be fearlessly enforced, without fear or favor, and that all men shall have a fair trial, is of greater value to society than a record of convictions."

## Conclusion.

Selective Service regulations, intended as a shield to the rights of registrants, may not be evaded.

It is improper for government counsel to seek a conviction by an inflammatory appeal to wartime emotions.

The judgment should be reversed.

Respectfully submitted,

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## APPENDIX A.



### Omission of Step in Selective Service Process—Authority of Board

[¶ 19,694]

Local board is without authority to classify registrant not granted hearing requested. Action of local board when not within the framework of the Selective Service process is not conducive to fair administration in protecting the registrant. Digest of *United States v. Peterson,* United States District Court for Northern District of California, January 28, 1944.

See ¶ 18,625.

Defendant, a Jehovah's Witness, was charged with failure to report for induction under the Selective training and Service Act. Defendant moved to dismiss indictment because of insufficient evidence to support the charge.

When classified 1-A registrant made a written request for a personal hearing. He appeared at a meeting of the board and stated to the clerk that he wanted to see the board about his classification as a minister. The clerk took the registrant's file into the room where the board met and gave it to the members but not in the presence of the registrant. The clerk relayed to the defendant the message from the board that if he was on the approved list of ministers at State Headquarters he would be classified IV-D; otherwise he would be subject to induction. The clerk testified that the registrant was apparently satisfied. He was subsequently advised in writing that the board had received word that he was not on the approved

list of ministers and that his induction was imminent. He was sent a notice to report for induction which he refused to do. His induction was thereupon cancelled and his file sent to the Board of Appeal. The Board of Appeal classified him I-A and he was again ordered to report for induction. He once more refused to obey the order.

The motion to dismiss the indictment is predicated, the Court points out, on defendant's contention that he was not permitted a personal appearance before the board. In *United States v. Laier,* decided on November 8, 1943, the court held that a registrant who requests a personal hearing is entitled to appear before the board and be heard as part of *the due process* of law and that until such hearing is granted the board is without jurisdiction to classify him. The importance of such hearing is shown by Rule 625.2 where it is provided that "at any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification." The regulation plainly outlines the procedure to be followed by the local draft board in such circumstances.

In this particular case personal appearance was not denied but defendants' classification was actually discussed while he remained in the outer office. This, the Court holds, did not constitute compliance with the regulation permitting a personal appearance. Nor does the board have authority to delegate to the clerk of the board the power to act as its agent in the matter of personal ap-

pearance. It was not the defendant's duty to insist on his right to appear. Furthermore, under the circumstances the "apparent" demeanor of the registrant cannot be said to constitute a waiver of a written request.

Distinguishing the present proceeding from the decision of the Supreme Court in the *Falbo* case, the Court emphasizes that here the question is not whether registrant was properly classified, but involves the effect of an omission of a "step in the selective process."

The Court outlines the steps taken by a registrant and states that he "may contest his classification by a personal appearance before the local board, and if that board refuses to alter the classification, by carrying his case to a board of appeal, and thence, in certain circumstances, to the President. Only after he has exhausted this procedure is a protesting registrant ordered to report for service."

"Careful provision was made for fair administration of the Act's policies within the framework of the selective service process. . . ." The order for induction was not issued "in that process" but outside of it. Accordingly, the action taken by the local board is held not to have been within the framework of the Act set up to protect the registrant, for the board was without authority to classify a registrant who requested a personal hearing, without granting him such hearing.

The motion to dismiss is therefore granted.

New Matters ¶ 19,694

## APPENDIX B.

In the Southern Division of the United States District Court for the Northern District of California.

United States of America, Plaintiff, vs. John Gilbert Laier, Defendant. No. 28036-S.

### Opinion.

St. Sure, District Judge:

The Grand Jury presented an indictment against the defendant charging him with failing to report for induction under the Selective Training and Service Act of 1940, 50 USCA App. 301 *et seq.* The case was tried to the Court without a jury. At the close of the trial defendant moved to dismiss the indictment on the ground that the evidence was insufficient to support the charge.

The facts are undisputed. Defendant is a registrant of Local Board No. 112 at Palo Alto, California. After he was classified by that board in class 1-A he requested an opportunity to appear in person before the board as was his right under the provisions of Rule 625.1 of the Selective Service Regulations. His request was denied. He then appealed to Board of Appeal No. 9 at San Jose, which affirmed the action of the local board in classifying the registrant in class 1-A. Thereafter the local board ordered defendant to appear for induction on May 22, 1943, and the indictment is predicated upon his failure to comply with that order.

Defendant contends that because of the failure of the board to permit him a personal appearance, he was denied due process of law, with the result that the board never acquired jurisdiction to issue an order of induction; that the order of induction issued was void and the registrant was under no legal duty to comply with it.

The Government argues that the failure of the board to grant a hearing is no defense in the present prosecution but can only be the subject of a habeas corpus proceeding after induction of the registrant; and that regardless of the rule permitting a hearing, the appeal cured any error committed by the local board.

In support of its first contention the Government cites U. S. v. Griemes and U. S. v. Sadlock, 129 F. (2nd) 811. In those cases defendants, who were Jehovah's Witnesses, attempted to introduce evidence that they should have been classified as ministers of the gospel and that the board acted arbitrarily and capriciously in classifying them as conscientious objectors. The court held that whether or not the board acted arbitrarily and capriciously was a matter to be determined on writ of habeas corpus and that it was not a defense to a criminal prosecution for failure to report for induction. In its opinion the court stated that "whether a registrant is a minister of religion presents a question of fact which, from its very nature, is committed by the act to the determination of the competent local draft board."

There is a practical reason for this rule, because to permit a court or jury in prosecutions for draft evasion to determine whether the defendant was in fact properly classified would have the effect of nullifying the power expressly committed to the draft boards to classify registrants. A similar thought is expressed in U. S. *ex rel.* Koopowitz v. Finley, 245 Fed. 871, which arose under the the Selective Draft Act of 1917; Whether a person is a non-declarant alien or not is a question of fact, exactly the same as whether a person is a duly ordained minister of religion . . ., and the clear purpose of the act was that the fact should be ascertained by the administrative

boards which the President was authorized to create. Any other method would have made the act, . . . unworkable."

The Government also cites Fletcher v. U. S., 129 Fed. (2nd) 262, where the same contention was made by the defendant, and the court held that evidence as to whether the board acted arbitrarily and capriciously was properly refused.

It may well be that where the record shows compliance with the regulations made for the protection of the registrant, and it is a question of fact and law this question should properly be determined on habeas corpus. But I am of the opinion that where, as here, the record itself shows that the draft board has disregarded the regulations and has exceeded its jurisdiction in classifying a registrant, the order to appear for induction is void as a matter of law and the indictment predicated thereon is subject to a motion to dismiss.

The provisions of Rule 625.1 are mandatory: "Every registrant . . . shall have an opportunity to appear in person . . ." under conditions which, it is admitted, the registrant complied with. Rule 625.2(c) provides in part: "After the registrant has appeared . . . the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified. . . ." Rules 625.2(d) and (3) require that the draft board, after the personal appearance of the registrant, shall mail a new notice of classification to him which is subject to the same right of appeal as the original classification. Rule 625.3 provides that if the registrant requests a personal appearance he shall not be inducted until 10 days after the new notice of classification referred to in 625.2(d) is mailed to him by the local board.

From the above provisions it clearly appears that the registrant is entitled to a hearing as a matter of right. And it is settled law that such a personal hearing is a part of due process in such proceedings. 16 C. J. S. 622; St. Joseph Stockyards Co. v. U. S., 298 U. S. 38; Yamatoya v. Fisher, 189 U. S. 86.

It is also apparent that the application for an opportunity to be heard actually suspends the classification of the registrant who after such hearing must be reclassified "in the same manner as if he had never before been classified," and that he may not be inducted until ten days after he receives the new notice of classification.

Admittedly, the local board failed to comply with these provisions, and the effect of such failure would seem to be that the registrant was not classified at all, nor could he legally be inducted, at the time it made its order. In issuing its order, the board acted entirely outside its jurisdiction and without any legal authority.

The government further contends that the appeal by registrant to the Board of Appeal cured any error that the local board may have committed. It is urged that because the defendant furnished the appeal board with all the information that he might have presented at a hearing before the local board he was not prejudiced.

The fact that the Board of Appeal sustained the classification made by the local board in no way lent legality to its erroneous procedure. Defendant was entitled under the Regulations and as a part of due process of law to make a personal appearance. As well might it be said that an accused who was incarcerated during a criminal trial but permitted to submit a written statement of his case in court and present his case. Moreover, if the regulations had been followed, defendant would have been

entitled to an appeal from the new classification, which in his case was never made.

The Government cites Bowles v. U. S., 319 U. S. 33, as supporting its contention. There the defendant contended that the local board misinterpreted the act in classifying him. A final appeal by the registrant to the President had been granted, and the Director on that appeal made a determination of fact adverse to the claim of petitioner that he was a conscientious objector. The Supreme Court held that this determination superseded that of the local board, that the order for induction was based upon that determination, and that therefore, whether or not the registrant was given a fair hearing before the local board was not a defense to the criminal prosecution. Where facts are determined *de novo* on appeal, the appellant is not prejudiced by error committed by the inferior fact-finding body. In the present case, however, the objection is not made primarily to the facts as found by the local board but to the fact that defendant was denied his lawful right to appear in person and be heard. This error, it would seem, could be cured only by granting such hearing.

The motion to dismiss the indictment will be granted.

Nov. 8, 1943.

## APPENDIX C.

DEPARTMENT OF JUSTICE

Office of the Assistant to the Attorney General
Washington

Revised October 10, 1942.

INSTRUCTIONS AND DIRECTIONS TO REGISTRANTS CLAIMING EXEMPTION AS CONSCIENTIOUS OBJECTORS.

Pursuant to the provisions of Section 5(g) of the Selective Training and Service Act of 1940 and Section 627.25 of the Selective Service Regulations, the Department of Justice is required to make an inquiry and to hold a hearing with respect to the character and good faith of the objections of each registrant whose claim for exemption from training and service under the said Act on the ground that he is conscientiously opposed to participation in war has been denied (or granted) by a local board, and an appeal has been taken to an appeal board.

1. In each instance, the hearing will be conducted by a duly designated Hearing Officer, and the registrant will be duly notified by the Hearing Officer of the place and time fixed for the hearing on his claim.

2. Upon receipt of the notice of hearing by the registrant, and before the date and time set for the hearing, the registrant *should communicate in writing with the Hearing Officer* and advise whether he will appear at such hearing.

(a) If it is impossible for the registrant to appear on the date and at the time scheduled, he should state to the Hearing Officer in writing the reasons which make it impossible for him to do so, and request postponement of the hearing which, in the discretion of

the Hearing Officer, may be granted, and a new date and time scheduled.

(b) If the registrant, without explanation, does not appear for hearing, the Hearing Officer will consider the registrant to have waived his right to hearing, and will proceed to make his recommendation on the basis of the record and evidence contained in the registrant's Selective Service file.

3. If, at the time of receipt of notice of hearing, the registrant no longer desires to be considered as a conscientious objector, he should immediately address a letter to the Hearing Officer stating that he will not appear for hearing and that he desires to withdraw his claim for exemption as a conscientious objector.

4. At the hearing, the registrant, at his request, will be informed by the Hearing Officer as to the general nature and character of any evidence disclosed by the investigation which is unfavorable to, or tends to defeat, his claim for exemption as a conscientious objector, and the registrant will be afforded an opportunity to explain or rebut such evidence.

5. At the hearing before the Hearing Officer of the Department of Justice, the registrant will be permitted to make a full and complete presentation of his claim. He may bring with him to the hearing as witnesses any persons who have personal knowledge of facts concerning his religious training and belief and concerning the character and good faith of his objections to participation in war.

6. The registrant may bring with him and submit at the hearing written statements of persons not present at the hearing containing facts and information within their personal knowledge concerning the registrant's religious

training and belief and the character and good faith of his objections to participation in war. Such statements shall be sworn to before a notary public or other person authorized to administer oaths. The registrant may also submit at the hearing any papers or documents, or certified copies thereof, tending to support his claim.

7. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. Registrants will not be required to adhere to the ordinary rules of evidence. It will not be necessary for the registrant to be represented at the hearing by an attorney. The registrant may bring with him a relative or friend or other adviser, who may sit with him at the hearing. Such persons, whether an attorney or not, will not be permitted to object to questions or make any argument concerning any evidence or any phase of the proceeding. The hearing will at all times be under the direction and control of a duly designated Hearing Officer, who may terminate the proceeding upon the violation of these instructions by the registrant or his adviser.

8. Ordinarily, no stenographic record of the oral testimony given at the hearing will be made. However, the Hearing Officer may, in his discretion, have such record made.

JAMES ROWE, JR.,
*The Assistant to the Attorney General.*